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No. 90-1701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA,

Petitioners,

v.

SHEARSON LEHMAN/AMERICAN EXPRESS INC. and RAYMOND R. CLEMENTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THEODORE A. KREBSBACH
Counsel of Record for Respondents

Office of the General Counsel
Shearson Lehman Brothers Inc.
388 Greenwich Street
New York, New York 10013
(212) 464-7206

JEFFREY L. FRIEDMAN

Office of the General Counsel
Shearson Lehman Brothers Inc.
(212) 464-7293
Of Counsel

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1990) ("FAA"), mandates arbitration of claims asserted under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) ("ERISA"), when parties have agreed to resolve their ERISA disputes by arbitration?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 926 F.2d 116, and is reproduced at Appendix B hereto. The opinion of the United States District Court for the District of Connecticut is unreported but is reproduced at Appendix C hereto.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1991 and is reproduced at Appendix D hereto. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED*

United States Arbitration Act

Section 2, 9 U.S.C. § 2

Section 3, 9 U.S.C. § 3

Employee Retirement Income Security Act

29 U.S.C. § 1001

29 U.S.C. § 1004

29 U.S.C. § 1132

29 U.S.C. § 1144

* The text of these provisions is reproduced in full at Appendix A hereto.

STATEMENT OF THE CASE

Petitioner Frank L. Bird, the trustee as well as a participant and a beneficiary of the Frank L. Bird Profit Sharing Trust (the "Trust"), opened a securities account on behalf of the Trust in or around July 1984 with respondent Raymond R. Clements, formerly employed by respondent Shearson Lehman/American Express Inc. ("Shearson")[1] as a registered representative in a branch office located in Boston, Massachusetts. At or around the time Mr. Bird opened the securities account for the Trust, he executed a Customer's Agreement with Shearson in his capacity as trustee. The Customer's Agreement defines the terms and conditions of the parties' business relationship and includes their agreement to arbitrate any controversy relating to the Trust's securities account at one of three designated self-regulatory organization ("SRO") arbitration forums:[2]

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to [the Trust's] accounts, to transactions with [Shearson] for [the Trust] or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as [the Trust] may elect.

Petitioners filed a complaint against Shearson and Mr. Clements in the United States District Court for the District

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[1] Pursuant to Rule 28.1 of the United States Supreme Court Rules, the parent company of Shearson is Shearson Lehman Brothers Holdings Inc. ("SLBHI") and the parent company of SLBHI is the American Express Company. Non-wholly owned affiliates of Shearson are Gulfmark Int'l, First Capital Holdings Corp., Energy Ventures, Inc. and Illinois Central Corp.

[2] The SROs are overseen by the Securities and Exchange Commission. *See* § 19 of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1982) ("Exchange Act"). The Court examined the SRO arbitration forums in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987), and found them to be fair, efficient and fully capable of resolving statutory disputes.

of Connecticut on or around July 21, 1987. The complaint alleges that from July 1984 through May 1986, respondents traded the Trust account excessively and inappropriately in light of the Trust's investment objectives. The complaint alleges that this conduct constitutes: (a) a breach of fiduciary duties under ERISA, 29 U.S.C. § 1004; (b) a violation of § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Securities and Exchange Commission Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5; (c) a violation of various provisions of the Connecticut General Statutes; and (d) a violation of various provisions of the Massachusetts Laws. Petitioners filed for a motion for leave to file an amended complaint which the district court granted on September 30, 1987. The district court subsequently dismissed certain state law claims of petitioners, and petitioners voluntarily withdrew their remaining state law claims.

Shearson and Mr. Clements filed a motion in the district court on or about August 17, 1987 for an order enforcing the arbitration agreement entered into by the parties pursuant to § 3 of the FAA. The district court issued a bench ruling on April 4, 1988, which held that the parties' arbitration agreement is valid and requires petitioners to arbitrate their § 10(b) claim in accordance with the Court's opinion in *McMahon*. The district court, however, refused to enforce the parties' arbitration agreement with respect to petitioners' ERISA claim, finding such claims to be nonarbitrable.

Respondents filed an appeal with the court of appeals to review the district court's refusal to enforce the parties' agreement to arbitrate their ERISA dispute. A divided court of appeals affirmed this portion of the district court's opinion on March 28, 1989 and ruled that Congress intended to prohibit enforcement of an agreement to arbitrate an ERISA claim. *See Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292, 295-98 (2d Cir.) ("Bird I"), *vacated and remanded*, 110 S. Ct. 225 (1989). Judge Cardamone dissented from this ruling. *See Bird I*, 871 F.2d at 298 (Cardamone, J., dissenting). The court of appeals, in its *de novo* review of the district court's order, also ruled that a valid arbitration agreement exists between the parties and it affirmed the district court's order requiring

arbitration of the parties' § 10(b) dispute. *See Bird I*, 871 F.2d at 294-95. Respondents filed a petition with the court of appeals for rehearing and suggestion for rehearing *en banc*. The court of appeals denied rehearing by order dated May 9, 1989 from which Judge Cardamone dissented.

Respondents subsequently filed a Petition for a Writ of Certiorari with this Court on or about August 7, 1989 to review the court of appeals' opinion in *Bird I* rendering unenforceable agreements to arbitrate ERISA disputes. On October 10, 1989, this Court issued an order which: (1) granted respondents' Petition for a Writ of Certiorari, (2) vacated the court of appeals' judgment rendering unenforceable the parties' agreement to arbitrate their ERISA dispute, and (3) remanded the case to court of appeals for further consideration in light of *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917 (1989). Justices Brennan, Marshall and Stevens dissented from this order. *See Shearson Lehman/American Express, Inc. v. Bird*, 110 S. Ct. 225 (1989).

The court of appeals issued an order vacating its March 28, 1989 judgment in accordance with this Court's order, on or about December 11, 1989, and issued a subsequent order remanding the case to the district court with instructions to reconsider its opinion in light of *Rodriguez*, on or about January 19, 1990.

The district court once again ruled that agreements to arbitrate ERISA disputes are unenforceable on or about July 16, 1990. *See* Appendix C. The district court relied on the reasons expressed in the court of appeals' vacated opinion in *Bird I* to support its ruling and it concluded that *Rodriguez* did not require a different result. Respondents appealed to the court of appeals from this order and the court of appeals reversed the district court's order, ruling that petitioners are required to arbitrate their ERISA claim. Judge Kearse dissented from this order. *See Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2d Cir. 1991) ("Bird II"), Appendix B.[2]

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[2] Petitioners filed a Supplemental Appendix with the Court subsequent to their filing of the Petition which contains the opinion of the court of appeals in

(footnote continued)

In its order, the court of appeals upheld its ruling in *Bird I* that the parties entered into a valid arbitration agreement. *See Bird II*, 926 F.2d at 118, Appendix B at A-9. The court of appeals also held that there is no congressional intent to prohibit arbitration of ERISA claims and it recognized that its opinion in *Bird I*, refusing to enforce the parties' agreement to arbitrate their ERISA claim, "was motivated, in part, by an 'outmoded presumption of disfavoring arbitration proceedings.'" *See Bird II*, 926 F.2d at 118-19 (citing *Rodriguez*, 109 S. Ct. at 1920). The court of appeals also rejected: (1) petitioners' reliance on this Court's labor arbitration precedent represented in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), and (2) petitioners' arguments that arbitration of ERISA claims would infringe upon the enforcement and oversight responsibilities of the Secretary of Labor and the development of federal common law under ERISA. *See Bird II*, 926 F.2d at 121-22, Appendix B at A-14-16.

Petitioners subsequently filed the Petition on or about April 12, 1991. Respondents contend that the Court should deny the Petition since the lower courts are properly uniformly enforcing agreements to arbitrate ERISA claims pursuant to the Court's modern arbitration precedent represented in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *McMahon* and *Rodriguez*, and arguments such as those relied on by petitioners to support their request for certiorari were refuted in the Court's recent opinion in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 59 U.S.L.W. 4407 (May 13, 1991).

(footnote continued)
Bird II. This opinion, however, was subsequently corrected by the court of appeals. The court of appeals' corrected opinion in *Bird II* is contained herein at Appendix B.

REASONS FOR DENYING THE WRIT

Petitioners seek certiorari from the Court based on their contention that the court of appeals' ruling that agreements to arbitrate ERISA disputes are enforceable is an important issue of federal law which has not been, but should be, settled by this Court and petitioners contend that a conflict exists among the circuit courts of appeals on the issue presented by the Petition which requires resolution by the Court. *See* Petition at 4-5 (citing United States Supreme Court Rules 17.1(a) and (e)). These arguments are baseless. The lower federal courts are presently uniformly enforcing agreements to arbitrate ERISA disputes in light of this Court's modern arbitration jurisprudence represented in *Mitsubishi*, *McMahon* and *Rodriguez* which clearly requires enforcement of such agreements. Petitioners also present arguments supporting the granting of certiorari which were rejected by the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 59 U.S.L.W. 4407 (May 13, 1991), rendered subsequent to the filing of the Petition. *See* Petition at 5-7.

A. The Lower Courts are Uniformly Enforcing Agreements to Arbitrate ERISA Disputes in Accordance with The Modern Arbitration Jurisprudence of This Court

Petitioners contend that the Court should grant certiorari in this case because the circuit courts are in conflict regarding the enforceability of agreements to arbitrate ERISA disputes. Petitioners claim that such a conflict exists since the Second and Eighth Circuits have ruled that an agreement to arbitrate an ERISA dispute is enforceable in *Bird II* and *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), respectively, and the Third Circuit reached a contrary conclusion in *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985). *See* Petition at 4-5. However, as the Second Circuit recognized in *Bird II*, and even petitioners recognize in the Petition, the Third Circuit's ruling in *Barrowclough* was decided prior to this Court's opinions in *Rodriguez* and *McMahon*. *See Bird II*, 926 F.2d at 119, Appendix B at A-11; Petition at 4-5. *Barrowclough* was also decided prior to *Mitsubishi*, so it was decided prior to, and without the benefit of, any pronouncement of this Court's

modern arbitration precedent. In fact, the Third Circuit in *Barrowclough* relied on *Wilko v. Swan*, 346 U.S. 427 (1953) to support its conclusion that statutory ERISA disputes are not subject to arbitration. *See Barrowclough*, 752 F.2d at 940 n.17. The Court overruled *Wilko* in *Rodriguez* and described *Wilko* as pervaded by "the old judicial hostility to arbitration," stating that *Wilko* "has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *See Rodriguez*, 490 U.S. at 480-81. *Barrowclough* is thus premised on an outmoded presumption against arbitration of statutory disputes and it has been superseded by the Court's modern arbitration precedent.

Moreover, apart from the Second Circuit's opinion in *Bird I* which was vacated by this Court, every court that has analyzed the enforceability of agreements to arbitrate ERISA disputes in light of the Court's modern arbitration precedent has rendered such agreements enforceable and has not relied on *Barrowclough*. *See Bird II; Sulit; Glover v. Wolff, Webb, Burk & Campbell*, 731 F. Supp. 292, 293 (N.D. Ill. 1990); *Southside Internists Group v. Janus Capital Corp.*, 741 F. Supp, 1536, 1541 (N.D. Ala. 1990); *Rosenblum v. Drexel Burnham Lambert*, 700 F. Supp. 874, 876-77 (E.D. La. 1987); *Cohen v. Cowen Securities, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,925 at p. 95,108 (S.D. Fla. July 24, 1989); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1990 WESTLAW 68532 (W.D. Okla. Mar. 8, 1990); *Iacono v. Drexel Burnham Lambert, Inc.*, 715 F. Supp. 18 (D.R.I. 1989); *Santamauro v. Shearson Lehman Hutton Inc.*, No. B-89-321 (TFGD) (D. Conn. April 4, 1990). There is thus unanimity among all courts, let alone the circuit courts, on the issue presented by the Petition and there is no conflict which this Court needs to resolve through the granting of certiorari in this case.

B. The Court's Recent Opinion in *Gilmer v. Interstate/Johnson Lane Corp.* Refutes Petitioners' Arguments Supporting Their Request for Certiorari

In its most recent pronouncement of its modern arbitration jurisprudence, the Court, in *Gilmer*, rendered enforceable

agreements to arbitrate claims asserted under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1982) ("ADEA"). *Gilmer* was rendered subsequent to the filing of the Petition and the Court rejected arguments in *Gilmer* which are relied on in the Petition.

Initially, the Petition argues that the parties' arbitration agreement is governed by the Court's labor arbitration precedent and not by the Court's commercial arbitration precedent relied on by the court of appeals:

> Neither *McMahon* nor *Rodriguez de Quijas* speaks directly to the issue in this case. . . . The closest analogy to ERISA claims like those asserted here is not the commercial disputes of which *McMahon* and *Rodriguez de Quijas* are representative but the labor cases where this Court has consistently allowed claimants to vindicate their statutory rights in the judicial forum provided. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984).

See Petition at 5. The same argument was raised in *Gilmer* and it was flatly rejected by the Court.[4]

Like petitioners in the present case, the petitioner in *Gilmer* had entered into a privately negotiated commercial arbitration agreement governed by the FAA and he sought to avoid his contract by relying on the Court's labor arbitration precedent. *See Gilmer*, 59 U.S.L.W. at 4411. The Court in *Gilmer* refused to apply its labor arbitration precedent to the kind of agreement at issue in *Gilmer* and the present case since: (1) these cases did not involve the enforceability of agreements to arbitrate statutory claims, (2) the labor arbitrators who decided these cases pursuant to collective-bargaining agreements did not have the authority to resolve statutory disputes, (3) the claimants in the

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[4] This argument was also properly rejected by the court of appeals. *See Bird II*, 926 F.2d at 121, Appendix B at A-14-15.

arbitration proceedings were represented by unions, and thus the claimants' individual rights might have been compromised by collective representation, (4) these cases were not decided under the FAA, and (5) these cases evidenced a mistrust of arbitration which has been rejected in subsequent decisions of the Court. *See Gilmer*, 59 U.S.L.W. at 4411 & n.5. Likewise, the Court's labor arbitration cases cannot be relied on to prevent enforcement of the parties' agreement to arbitrate their ERISA dispute.

Petitioners also relied on the Third Circuit's opinion in *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) to support the granting of certiorari in this case. *See* Petition at 6-7. The Third Circuit in *Nicholson* rendered unenforceable agreements to arbitrate ADEA claims, relying primarily on the Court's labor arbitration precedent. *See Nicholson*, 877 F.2d at 231. *Nicholson* obviously can no longer be relied on in light of *Gilmer*.

Lastly, petitioners suggest that if agreements to arbitrate ERISA disputes are enforced, this will diminish the Secretary of Labor's enforcement role under the statute and thwart the development of federal common law under ERISA. *See* Petition at 7. These arguments were rejected by the Court in *Gilmer* in the context of the ADEA.[5] The Court in *Gilmer* was "unpersuaded by the argument that arbitration will undermine the role of the Equal Employment Opportunity Commission in enforcing the ADEA" and rejected the argument that enforcing agreements to arbitrate ADEA claims would infringe upon the development of the law under ADEA, stating that "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." *Gilmer*, 59 U.S.L.W. at 4439-40. The same holds true for the enforcement powers of the Secretary of Labor and the development of the law under ERISA. Thus, these arguments of petitioners are also insufficient to warrant the granting of certiorari in this case.

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[5] These arguments were also properly rejected by the court of appeals. *See Bird II*, 926 F.2d at 121-22, Appendix B at A-15-16.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request the Court to deny the petition for a writ of certiorari in this case.

DATED: New York, New York
June 10, 1991

THEODORE A. KREBSBACH
Counsel of Record for Respondents

Office of the General Counsel
Shearson Lehman Brothers Inc.
388 Greenwich Street
New York, New York 10013
(212) 464-7206

JEFFREY L. FRIEDMAN

Office of the General Counsel
Shearson Lehman Brothers Inc.
(212) 464-7293

Of Counsel

APPENDIX

APPENDIX A

STATUTORY PROVISIONS INVOLVED

United States Arbitration Act

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

29 U.S.C. § 1001. **Congressional findings and declaration of policy**

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1104. **Fiduciary duties**

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any

breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1132. Civil enforcement

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. § 1144. Other laws

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

APPENDIX B

[CORRECTED OPINION]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 721—August Term 1990

(Argued December 13, 1990

Decided January 17, 1991)

Docket No. 90-7688

FRANK L. BIRD, Trustee of the Frank L. Bird Profit Sharing Trust, FRANK L. BIRD, Individually, and JOAN SHEA,

Appellees,

—v.—

SHEARSON LEHMAN/AMERICAN EXPRESS, INC., and RAYMOND R. CLEMENTS,

Appellants.

Before:

TIMBERS, KEARSE and MINER,

Circuit Judges.

Appeal from an order entered July 16, 1990 in the District of Connecticut, Jose A. Cabranes, *District Judge*, denying appellants' motion to compel arbitration of appellees' ERISA claim and to stay proceedings in the district court pending arbitration.

Reversed and remanded.

Judge Kearse filed a dissenting opinion.

JEFFREY L. FRIEDMAN, New York, N.Y. (Theodore A. Krebsbach, New York, N. Y., on the brief) *for appellants Shearson Lehman/American Express, Inc. and Raymond R. Clements.*

DONALD R. HOLTMAN, Hartford, Conn. (Katz & Seligman, Hartford, Conn., on the brief) *for appellees Frank L. Bird, Trustee of the Frank L. Bird Profit Sharing Trust, Frank L. Bird, Individually, and Joan Shea.*

TIMBERS, *Circuit Judge:*

Appellants Shearson Lehman/American Express, Inc. (Shearson) and Raymond R. Clements appeal from an order entered July 16, 1990 in the District of Connecticut, Jose A. Cabranes, *District Judge*, denying their motion to compel arbitration of a claim brought by appellees Frank L. Bird, Individually and as Trustee of the Frank L. Bird Profit Sharing Trust, and Joan Shea for breach of fiduciary duty pursuant to the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1001 *et seq.* (1988).

On appeal, appellants contend that the Federal Arbitration Act (FAA), 9 U.S.C. § I *et seq.* (1988), requires that agreements to arbitrate statutory ERISA claims are enforceable.

For the reasons that follow, we reverse the judgment of the district court and remand for proceedings consistent with this opinion, including arbitration forthwith.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Frank L. Bird is the Trustee and a participant and beneficiary in the Frank L. Bird Profit Sharing Trust (the Trust). Joan Shea is a participant and beneficiary in the Trust. The Trust was established to provide for the retirement of its participants and beneficiaries and is governed by the terms of ERISA.

Raymond Clements, a broker and vice president of Shearson, solicited Bird as a client. Bird was interested in investing the assets of the Trust. At their first meeting, Bird alleges that he explained to Clements that the investment objectives for the Trust were long term growth and safety of the Trust's assets. In his capacity as Trustee, Bird invested all the assets of the Trust in a securities account with Shearson.

Bird signed Shearson's standard "Customer's Agreement" prior to opening the account. That agreement contained an arbitration clause which provided that

> "Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect."

All of the Trust's assets, a total of $62,205.56, were deposited in the account. Fifty-five transactions were made in the account between July 24, 1984 and May 28, 1986. At the end of that period, $13,427.53 remained in the account. Appellees allege that the assets of the Trust were diminished due to mishandling by appellants, who allegedly made high risk investments on behalf of the Trust in disregard of the stated investment objectives of the Trust.

On July 21, 1987, appellees commenced this action and filed the complaint in the District of Connecticut. Count one of the complaint alleged a breach of fiduciary duties under ERISA. 29 U.S.C. § 1104 (1988). Count two alleged that the account had been churned in violation of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j) (1988), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1990). The complaint also set forth various state law claims; these subsequently were dismissed.

On August 18, 1987, appellants filed a motion invoking the arbitration clause in the Customer's Agreement and seeking a

stay of proceedings in the district court. The district court granted the motion as to the securities law claim, but denied the motion as to the ERISA claim. We affirmed the district court's decision. *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2 Cir. 1989) *(Bird I)*. We held that Congress intended to preclude a waiver of judicial remedies for statutory ERISA claims, but not for contractual claims involving ERISA-covered plans. *Id.* at 298.

Appellants filed a petition for a writ of certiorari in the Supreme Court. In the meantime, the Supreme Court filed its opinion in *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989). In *Rodriguez*, the Court held that agreements to arbitrate statutory claims arising under the Securities Act of 1933 were enforceable. Subsequently, the Court granted certiorari in *Bird I*, vacated our judgment, and remanded the case for reconsideration in light of *Rodriguez*. *Shearson Lehman/American Express, Inc.* v. *Bird*, 110 S. Ct. 225 (1989).

On January 19, 1990, we entered an order remanding the case to the district court for reconsideration in light of *Rodriguez*. On July 16, 1990, the district court, in a thoughtful opinion, affirmed its original decision. The district court reasoned that "*Rodriguez* [was] consistent with the Supreme Court's other recent rulings on arbitration and therefore [did] not significantly change the legal landscape in which this issue was originally considered." The district court held that statutory ERISA claims were not subject to compulsory arbitration. The court denied appellants' motion to compel arbitration and for a stay of the district court proceedings pending arbitration. This appeal followed.

II.

Initially, we set forth our standard of review. "[A] court asked to stay proceedings pending arbitration in a case covered by the [FAA] has essentially four tasks: first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those

claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then determine whether to stay the balance of the proceedings pending arbitration." *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 844 (2 Cir. 1987) (citations omitted). We review the district court's determinations on those issues *de novo*. *Id.* at 846.

In *Bird I*, we affirmed the district court's holding that Bird and Shearson entered into a valid arbitration agreement that encompassed the ERISA claim. *Bird I*, *supra*, 871 F.2d at 295. We see no reason to disturb that holding. Accordingly, the only issue before us on the instant appeal concerns the third element, i.e., whether Congress intended statutory claims created by ERISA to be nonarbitrable.

III.

We turn first to appellants' contention that the FAA requires that their agreement to arbitrate be enforced notwithstanding the fact that appellees' claim is for a breach of fiduciary duties under ERISA. We agree.

In *Bird I*, we held that the text of ERISA — particularly the provisions for exclusive federal jurisdiction of statutory claims, the remedial nature of the statute, and the underlying purposes of ERISA — compelled the conclusion that "Congress intended the federal courts to be the exclusive forum for resolving disputes of substantive rights." *Bird I*, *supra*, 871 F.2d at 295. We are told that *Bird I* was motivated, in part, by an "outmoded presumption of disfavoring arbitration proceedings". *Rodriguez*, *supra*, 109 S. Ct. at 1920. *Rodriguez* makes it clear that that is no longer tenable. Accordingly, we now reach a contrary result.

The FAA, "reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts. . . .' " *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (footnote and citation omitted). Section 2 of the FAA provides that "an agreement in writing to submit to arbitration an existing

controversy. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988). "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (the FAA "requires that we rigorously enforce agreements to arbitrate").

The "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987). Congress, however, may override the presumption favoring arbitration agreements by a contrary provision in another statute. *Id.* The burden of demonstrating such congressional intent rests with the party opposing arbitration. *Rodriguez, supra*, 109 S. Ct. at 1921; *McMahon, supra*, 482 U.S. at 227. The party contending that an agreement to arbitrate a statutory claim is not enforceable must show that "Congress intended in a separate statute to preclude a waiver of judicial remedies. . . ." *Rodriguez, supra*, 109 S. Ct. at 1921. "[S]uch an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon, supra*, 482 U.S. at 227 (citations omitted).

Applying these standards in a series of recent cases, the Supreme Court has upheld arbitration agreements involving various statutory claims. *E.g., McMahon, supra*, 482 U.S. at 227-38 (claim under § 10(b) of the Securities Exchange Act of 1934); *id.* at 238-42 (claim under civil provisions of Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-40 (1985) (claim under Sherman Antitrust Act). Most recently, the Court held that agreements to arbitrate claims brought pursuant to the Securities Act of 1933 are enforceable. *Rodriguez, supra*, 109 S. Ct. at 191921. In so holding, the Court overruled its holding in *Wilko* v. *Swan*, 346 U.S. 427 (1953) (a 1933 Act decision), which it stated "rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive

law" and had "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez, supra,* 109 S. Ct. at 1920.

Prior to *Rodriguez,* courts of appeals that considered the enforceability of agreements to arbitrate claims derived from ERISA reached varying conclusions. *Compare Bird I, supra,* 871 F.2d at 298 (agreement to arbitrate statutory ERISA claims is not enforceable) *and Barrowclough* v. *Kidder, Peabody & Co., Inc.,* 752 F.2d 923, 941 (3 Cir. 1985) (same) *with Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.,* 847 F.2d 475, 477-79 (8 Cir. 1988) (agreement to arbitrate statutory ERISA claim is enforceable). No court of appeals has considered this issue since *Rodriguez.* This case is one of first impression.

(A)

We consider next the text and legislative history of ERISA. We find nothing in the text or legislative history explicitly addressing the issue of whether Congress intended to preclude a waiver of a judicial forum for claims arising from the substantive guarantees of ERISA. We also find nothing in the text or legislative history that compels us to reach that conclusion by implication.

We are aware that one of the means by which Congress sought "to protect . . . participants in employee benefit plans and their beneficiaries" was "by providing . . . ready access to the Federal courts." 29 U.S.C. § 1001(b) (1988). This provision, however, does not speak to whether Congress intended to require that parties avail themselves of that forum. *Sulit, supra,* 847 F.2d at 478. It does not follow that "by permitting a federal judicial forum Congress also intended to override the Arbitration Act's aim of ensuring the enforcement of privately made agreements in which parties . . . have chosen to forego an available judicial forum in favor of arbitration." *Id.* at 479.

Similarly, the fact that Congress provided for exclusive federal jurisdiction of claims brought to enforce ERISA's substantive provisions, 29 U.S.C. § 1132(e) (1988), speaks only to which judicial forum is available, not to whether an arbitral forum

law is to be created and applied to ERISA disputes alleging breaches of fiduciary duties creates an inherent conflict with arbitration.

First, we do not believe that our holding will prevent the development of federal common law in this area. Our holding does not prohibit plaintiffs from bringing ERISA claims alleging a breach of fiduciary duty in federal courts. We merely hold that parties may provide by agreement that such claims will be arbitrated. If such agreements are the result of unequal bargaining power between the parties, general principles of contract law will bar enforcement. Second, the import of recent Supreme Court decisions is that arbitration is not to be distrusted no matter what the source of law to be applied is. Third, an arbitration determination is subject to review by the federal courts through a motion to enforce or to vacate the award.

Arbitration is not inconsistent with the underlying purposes of ERISA. Appellees have not sustained their burden of demonstrating that the text, legislative history, or underlying purposes of ERISA indicate that Congress intended to preclude a waiver of a judicial forum for claims arising under it. Accordingly, we hold that statutory claims arising under ERISA may be the subject of compulsory arbitration.

IV.

To summarize:

We hold that Congress did not intend to preclude a waiver of a judicial forum for statutory ERISA claims. We further hold that the FAA requires courts to enforce agreements to arbitrate such claims. The district court, therefore, erred in denying appellants' motion to compel arbitration of appellees' ERISA claim and for a stay of the district court proceedings pending arbitration.

Reversed and remanded with instructions that arbitration proceed promptly. The mandate shall issue forthwith.

KEARSE, *Circuit Judge*, dissenting:

I respectfully dissent from the majority's conclusion that an agreement to arbitrate future claims of breach of fiduciary responsibility under ERISA, 29 U.S.C. § 1101 *et seq.* (1988), is enforceable. Despite the general federal policy favoring arbitration, *see, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), arbitration should not be ordered where there is "an inherent conflict between arbitration and the statute's underlying purposes," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987). I believe there is such a conflict between arbitration and ERISA.

The underlying purpose of ERISA is "to protect . . . the interests of participants in employee benefit plans and their beneficiaries" by, *inter alia*, "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for . . . ready access to Federal courts." 29 U.S.C. § 1001(b) (1988). In an effort to achieve this purpose, Congress declined to adopt the traditional "reasonably prudent man dealing with his own property" standard for defining the scope of a fiduciary's duties. Rather, it intended that there be developed carefully tailored standards that (1) would vary depending on the capacity in which the fiduciary was acting and the expertise normally associated with that capacity, *see* 29 U.S.C. § 1104(1)(B) ("a fiduciary shall discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity . . . would use in the conduct of an enterprise of a like character and with like aims"), and (2) would reflect a particular sensitivity to the need to protect pension rights, *see* 29 U.S.C. § 1001(b) (goal of ERISA is "to protect . . . the interests of participants in employee benefit plans and their beneficiaries"). Congress intended that the courts, in fashioning the appropriate principles, would develop a new body of federal common law.

The legislative history of ERISA makes plain that Congress intended this new federal common law to be uniform and predictable. The congressional reports, in explaining why Congress chose to codify such a fiduciary responsibility requirement rather

is available. Moreover, the Supreme Court has upheld an arbitration agreement which was involved in a dispute grounded in a statute that similarly provides for exclusive federal jurisdiction. *E.g.*, *McMahon*, *supra*, 482 U.S. at 227 (Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1988)). In short, "any claim that the jurisdictional language of ERISA evidences a congressional intent to foreclose arbitrability would appear to be untenable in light of *McMahon* and [*Rodriguez*]." *Southside Internists Group* v. *Janus Capital Corp.*, 741 F. Supp. 1536, 1541 (N.D. Ala. 1990).

Liberal procedural provisions that facilitate bringing ERISA claims in federal court pursuant to § 1132 also do not compel a conclusion that Congress intended such claims to be nonarbitrable. The Supreme Court rejected that reasoning in *Rodriguez*. It declined to imply such an intent based on similar provisions that govern claims brought in the federal courts pursuant to the Securities Act of 1933. *Rodriguez*, *supra*, 109 S. Ct. at 1920.

We hold that ERISA's text and legislative history do not support a conclusion that Congress intended to preclude arbitration of claims brought pursuant to it.

(B)

We turn next to whether arbitration is inconsistent with ERISA's underlying purposes. We hold that it is not.

In its statement of findings and declaration of policy, Congress explained the circumstances leading to the passage of ERISA and the purpose of the legislation:

> "that despite the enormous growth in [pension] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated,

> employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable. . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness."

29 U.S.C. § 1001(a) (1988). "A reading of the statute's legislative history compels the conclusion that ERISA's purpose is to secure guaranteed pension payments to participants by insuring the honest administration of financially sound plans." *Pompano* v. *Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914 (2 Cir.), *cert. denied*, 459 U.S. 1039 (1982); *see also Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989) ("ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' and 'to protect contractually defined benefits' "(citations omitted)). Allowing parties to provide by agreement that their disputes will be resolved in arbitration is not inconsistent with those purposes.

"By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi, supra*, 473 U.S. at 628. Thus, arbitration is inconsistent with the underlying purposes of a statute "where arbitration is inadequate to protect the substantive rights at issue." *McMahon, supra*, 482 U.S. at 229.

A presumption that arbitration is an inadequate forum in which to resolve disputes based on complex federal statutes is untenable in light of recent Supreme Court decisions. *McMahon, supra*, 482 U.S. at 232; *Mitsubishi, supra*, 473 U.S. at 633-34. *Rodriguez* put to rest " 'the old judicial hostility to arbitration.' " *Rodriguez, supra*, 109 S. Ct. at 1920 (citation omitted). Appellees suggest no reason why the substantive rights guaranteed by ERISA will be jeopardized if the arbitration agreement is enforced. We are aware of no such reasons. As in *Rodriguez*, " '[t]here is nothing in the record before us nor in the facts of which we can take judicial notice, to indicate that the arbitral system. . .would not afford the plaintiff[s] the rights to which [they] are entitled.' " *Id.* at 1921 (citation omitted). Accordingly,

we disagree with those courts that have expressed the fear that substantive rights guaranteed by ERISA may be foreclosed by an arbitration agreement. *E.g.*, *Barrowclough*, *supra*, 752 F.2d at 941; *Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9 Cir. 1984).

Similarly, ERISA's remedial nature, *Firestone*, *supra*, 489 U.S. at 108, is not compromised "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, [since] the statute will continue to serve. . . its remedial. . . function." *Mitsubishi*, *supra*, 473 U.S. at 614. The Supreme Court has upheld agreements to arbitrate claims arising under other remedial statutes. *E.g.*, *McMahon*, *supra*, 482 U.S. at 240 (considering remedial role of RICO); *Mitsubishi*, *supra*, 473 U.S. at 636-37 (considering remedial role of antitrust legislation).

Appellees contend that their view is supported by a line of cases that held that arbitrations of claims under Title VII of the Civil Rights Act of 1964, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), the Fair Labor Standards Act, *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and 42 U.S.C. § 1983 (1988), *McDonald* v. *City of West Branch*, 466 U.S. 284 (1984) were not preclusive in subsequent litigation to vindicate rights under those statutes. We disagree.

In those three cases, the arbitrations were commenced pursuant to a clause in a collective bargaining agreement negotiated by the union, rather than the employee. They rely partially on the reasoning that an employee should not be bound by an arbitration clause he did not negotiate "where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine*, *supra*, 450 U.S. at 737. The Court was concerned with the fact that the union's interest might not coincide with the employee's and, therefore, the union's representation at arbitration might not be adequate. *McDonald*, *supra*, 466 U.S. at 291; *Barrentine*, *supra*, 450 U.S. at 742; *Gardner-Denver*, *supra*, 415 U.S. at 58 n.19.

The instant case does not raise such concerns. Bird signed the agreement that contained the arbitration clause. He cannot complain that his rights were bargained away by a third party. Although Shea did not sign the agreement, her interests and claims are essentially identical to Bird's. Under such circumstances, requiring Shea to arbitrate does not work an injustice. *Cf. Barrowclough, supra*, 752 F.2d at 938-39 beneficiaries are bound by principal's agreement to arbitrate when they "claim no present entitlement to the [benefits] and press no claims separate from his").

We also do not find arbitration inconsistent with the enforcement and oversight responsibilities granted to the Secretary of Labor. The Secretary is involved in reporting requirements, 29 U.S.C. § 1021 (1988), is authorized to commence an action for a plan fiduciary's breach of duty, 29 U.S.C. § 1132(a)(2) (1988), and is authorized to participate in litigation commenced by plan participants, 29 U.S.C. § 1132(h) (1988). Moreover, the Secretary is vested with broad investigatory powers to determine compliance with ERISA's provisions. 29 U.S.C. § 1134 (1988). "We are reluctant to conclude that the mere fact of administrative involvement in a statutory scheme of enforcement operates as an implicit exception to the presumption of arbitral availability under the FAA." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 895 F.2d 195, 198 (4 Cir.), *cert. granted*, 111 S. Ct. 41 (1990). Arbitration of ERISA claims will not impede the Secretary's supervisory and enforcement responsibilities. "[I]mplementation of the statutory purpose is [not] dependent upon the [Secretary's] involvement in each and every allegation [under ERISA]." *Id.*

Finally, one of the purposes of ERISA is to "bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state." H.R. Rep. No. 533, 93rd Cong. 1st Sess. 12 (1973), *reprinted in* 1874 U.S. Code Cong. & Admin. News 4639, 4650. This desire has led the Supreme Court to conclude that Congress intended that "courts. . . develop a 'federal common law of rights and obligations under ERISA-regulated plans.' " *Firestone, supra*, 489 U.S. at 110 (citation omitted). We are not persuaded that the fact that federal common

than relying on traditional principles of trust law, repeatedly noted the importance of creating a consistent source of law to help fiduciaries, administrators, and plan participants predict the legality of the fiduciaries' actions. Thus, the House of Representatives report stated as follows:

> [W]ithout . . . access to the courts, and without standards by which a participant can measure the fiduciary's conduct he is not equipped to safeguard either his own rights or the plan assets. Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act.
>
> . . . .The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions. . . .

H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted* in 1974 U.S. Code Cong. & Admin. News ("USCCAN") 4639, 4650. The Senate report was virtually identical. *See* S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973), *reprinted in* 1974 USCCAN 4838, 4865. The conference report on ERISA also noted that "[t]he conferees expect that the courts will interpret th[e] prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 302 (1974), *reprinted in* 1974 USCCAN 5038, 5083.

Congress's effort to promote the development of a uniform federal common law is reflected principally in ERISA's provision that only federal courts, and not state courts, have jurisdiction over fiduciary-duty claims under ERISA. *See* 29 U.S.C. § 1132(e)(1). In addition, Congress included a provision (a) requiring that in every ERISA action for breach of fiduciary responsibilities, a copy of the complaint must be served on the Secretary of Labor, and (b) allowing the Secretary to intervene in any such

action. *See* 29 U.S.C. § 1132(h). Both of these provisions further the goal of developing a uniform, consistent, and predictable body of ERISA fiduciary-responsibility law. This goal may well be frustrated with respect to fiduciary-duty claims against brokerage houses, however, if such claims are decided in arbitration. There are at least two reasons why this is so. First, a clear set of principles is unlikely to emerge since an arbitrator need not state any reasons for his decision. Second, judicial review of arbitration decisions is limited.

There is no general requirement that arbitrators of commercial disputes explain the reasons for an arbitration decision. *See* American Arbitration Association Commercial Arbitration Rule 42, *reprinted in Alternative Dispute Resolution Techniques* 2.042, 2.048 (1989) (requiring only that award itself be in writing). Nor do the American and New York Stock Exchanges require that arbitrators in securities disputes involving member firms give reasons for their decisions. *See* American Stock Exchange Rule 618(e) (requiring only that the award summarize the demands, the issues, and the results); New York Stock Exchange Rule 627(e) (same). Though public interest groups have urged that arbitration decisions resolving securities disputes be required to include written statements of the arbitrators' reasons for their decisions, the SEC has refused to require any such statement of reasons. *See* 54 Fed. Reg. 21,144, 21,151 (May 16, 1989) (SEC Order approving other proposed rule changes relating to securities arbitration). A decision without a stated rationale does little to develop the law, or to provide guidance for plan beneficiaries and fiduciaries, or to provide predictability as to the outcome of disputes. The SEC itself noted that in the absence of such statements "awards rendered by arbitrators in prior cases will not predict the vote or outcome of future cases." *Id.* at 21,152.

Further, in the absence of such statements, there will be no assurance that the arbitrators have followed whatever precedent there may be. And apparently, in the securities industry, they often do not. In 1988 congressional hearings on arbitration reform, a securities industry spokesman noted that arbitrators in the industry are regarded as being free to grant or deny awards without complying with applicable legal standards. *See, e.g.*,

Arbitration Reform: Hearings on H.R. 4960 Before the Subcomm. on Telecommunications and Finance of the Comm. on Energy and Finance, 100th Cong., 2d Sess. 85-86 (statement of Theodore Krebsbach, vice president and associate general counsel of Shearson Lehman Brothers). The spokesman stated that arbitrators frequently made decisions that did not reflect legal standards but rather sought to do rough justice: "A lot of times. . .you don't say one person is 100 percent wrong or 100 percent right and you do what makes sense under the circumstances." *Id.* at 138. A member of the plaintiffs' bar concurred. *See id.* (statement of Theodore G. Eppenstein, Esq.) ("many times arbitration panels will split the baby[;] . . . the way they split it, they will try to figure out how much the claimant has to pay his attorney and that will be the size of the award. . .").

Finally, though judicial review of arbitration decisions is available, its scope is severely limited. The standard of review is highly relaxed, for such decisions may be set aside only for "manifest disregard" of "clearly governing legal principle[s]," not merely because of "an arguable difference regarding the meaning or applicability of laws." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,* 808 F.2d 930, 933-34 2d Cir. 1986). And this standard is made even more difficult for the disappointed disputant to meet when the arbitrators have stated no reasons for their decision. Indeed, the SEC, in support of its decision not to require written opinions explaining arbitration awards, stated that such opinions would generally serve no purpose, since "[e]ven if awards contained errors of law, . . .a mistake of law is not currently grounds for vacating an arbitration award." *See* 54 Fed. Reg. 21,144, 21,151 n.45. Given the widespread use of arbitration clauses in brokerage firms' standard customer contracts, together with the lack of any requirement of a stated rationale in the arbitrators' decision and the very limited scope of judicial review, there is no likelihood that enforcement of such agreements will permit development of a carefully tailored, or uniform, or predictable body of law as to the fiduciary duties of brokers in dealing with ERISA pension plans.

In sum, I would conclude that broad-scale arbitration of ERISA fiduciary-responsibility claims would conflict with ERISA's goal of providing carefully tailored fiduciary duty principles and be antithetical to the goals of uniformity and predictability. Our prior ruling in the present case, holding the arbitration agreement unenforceable, was vacated by the Supreme Court and remanded for consideration in light of *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), *see Shearson Lehman/American Express, Inc. v. Bird*, 110 S. Ct. 225 (1989), *vacating and remanding* 871 F.2d 292 (2d Cir. 1989). *Rodriguez* did not alter the principle that arbitration agreements should not be enforced when there is an inherent conflict between arbitration and the statute's underlying purposes. I would uphold the district court's refusal to enforce the arbitration agreement here on the ground that there is an inherent conflict between arbitration and Congress's intention not to permit the resolution of ERISA fiduciary-duty disputes by the application of rough justice, ad hoc and sub silentio.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK L. BIRD, Trustee of the Frank L. Bird Profit Sharing Trust, FRANK L. Bird, Individually, and JOAN SHEA	:	
	:	Civ. No.
v.		H-87-530 (JAC)
	:	
SHEARSON LEHMAN/AMERICAN EXPRESS INC., AND RAYMOND R. CLEMENTS	:	

APPEARANCES:

DONALD R. HOLTMAN
(Katz & Seligman)
Hartford, CT
For Plaintiffs

WILLIAM S. ROGERS
(Tyler Cooper & Alcorn)
Hartford, CT

THEODORE A. KREBSBACH
JEFFREY L. FRIEDMAN
(Office of the General Counsel,
Shearson Lehman Hutton, Inc.)
New York, NY
For Defendants

ROBERT J. HIGGINS
GEORGE KAUFMAN
MARCUS C. MIGLIORE
(Dickstein, Shapiro & Morin)
Washington, DC
For Amici Curiae, New York State Teamsters Council Health and Hospital Fund, Upstate New York Teamsters Pension and Retirement Fund and New York Teamsters Conference Pension and Retirement Fund

RULING ON REMAND FROM THE COURT OF APPEALS

JOSÉ A. CABRANES, District Judge:

This case has been remanded by the Court of Appeals for the limited purpose of reconsidering the issue of whether a fiduciary responsibility claim under the Employee Retirement Income Security Act (ERISA) is subject to compulsory arbitration in light of the Supreme Court's decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989) ("*Rodriguez*"). Because *Rodriguez* is consistent with the Supreme Court's other recent rulings on arbitration and therefore does not significantly change the legal landscape in which this issue was originally considered, I continue to hold that fiduciary responsibility claims[1] under ERISA are not subject to compulsory arbitration.

Procedural History

This case was originally filed on July 21, 1987. Plaintiffs Frank L. Bird, a trustee and beneficiary of the Frank L. Bird Profit Sharing Trust ("the Plan"), and Joan Shea, a beneficiary of the Plan, allege, *inter alia*, that defendants' handling of the Plan's funds constituted a breach of fiduciary duties under ERISA, 29 U.S.C. § 1104. Plaintiffs assert that defendants, an investment firm and its vice president, solicited the management of the Plan's account and were aware of its conservative investment objectives. After twenty-two months and fifty-five transactions, the $62,205.56 from the Plan invested with defendants was reduced to $18,427.53, and plaintiffs claim that many of the investments made on their behalf were improperly risky.

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[1] The Court of Appeals' decision recognized a distinction between "purely contractual claims" and "fiduciary claims" – that is, "claims created as part of a comprehensive federal scheme protecting the rights of individual participants and beneficiaries." The same distinction is drawn by the statute, which allows contractual claims to be heard in state court, but give federal courts exclusive jurisdiction over fiduciary claims. *See* 29 U.S.C. §1132(e). The Court of Appeals stressed that its holding did *not* cover contractual claims. "We do not suggest that arbitration of purely contractual claims asserted pursuant to ERISA cannot be compelled." 871 F.2d at 298.

On August 13, 1987, the defendants filed a motion to compel arbitration and to stay the action pending arbitration. At a hearing on April 4, 1988, I held that an enforceable arbitration agreement existed and that the motion should be granted as to the securities claims, but that the ERISA claims were not subject to compulsory arbitration. On August 23, 1988 the defendants filed a notice of appeal as to the ruling on the ERISA claims, and on March 28, 1989, the Court of Appeals for the Second Circuit affirmed that ruling, having considered the issue *de novo*, 871 F.2d 292, 294 n. 4 ("A denial of a motion to compel arbitration is subject to *de novo* review. [citation omitted]"). The Supreme Court, on October 10, 1989, vacated by summary order the Court of Appeals' judgment and remanded the cause for reconsideration in light of *Rodriguez*. 110 S.Ct. 225 (1989). On January 19, 1990, the Court of Appeals, in turn, remanded the case to this court "with directions to proceed in accordance with the mandate of the Supreme Court."

Discussion

Rodriguez does not alter the basic framework, set out in *Shearson/American Express, Inc. v. McMahon*, 107 S.Ct. 2332 (1987), within which issues of arbitrability are determined. "The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, provides the starting point . . . and the burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies . . . ." *Id.* at 2337. Such congressional intent " 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* (citations omitted; brackets in original).

This court has been authorized and directed only to reconsider its decision in this case in light of *Rodriguez*. While *Rodriguez* overruled *Wilko v. Swan*, 346 U.S. 427 (1953), it confirmed, rather than departed from, the Court's other recent decisions about arbitrability. *Wilko* had found claims under the Securities Act of 1933 not to be subject to compulsory arbitration. During the last decade, the Court has recognized arbitration as a legitimate alternative to formal litigation and has been

less willing to find federal statutory rights exempt from arbitration agreements. As the Court noted in *Rodriguez*,

> [t]he shift in the Court's views on arbitration away from those adopted in *Wilko* is shown by the flat statement in *Mitsubishi [Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)]: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

109 S.Ct. at 1920. Other cases besides *Mitsubishi* confirmed this change in perspective. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

While *Wilko* was not normally overruled until *Rodriguez*, the anti-arbitration perspective underlying *Wilko* had been discredited by *McMahon*, *supra*. In *McMahon*, the Court explained that changing conditions cast doubt on the earlier decision:

> [T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. . . . Even if *Wilko's* assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's oversight authority.

107 S.Ct. at 2341. In fact, the Court explicitly noted that it was limiting *Wilko* and disapproved of that case's holding, "While *stare decisis* concerns may counsel against upsetting *Wilko*'s [result] under the Securities Act, we refuse to extend *Wilko*'s reasoning to the Exchange Act in light of these intervening regulatory developments." *Id.*

Given how strongly *Wilko* was already disfavored at the time the instant case was first considered, I am not persuaded that

a different result should be reached in light of *Rodriguez*. The first prong of the analysis under *McMahon*, whether the text and legislative history of ERISA preclude arbitration, is not significantly affected by *Rodriguez*. In holding that ERISA claims for breach of fiduciary duty are not arbitrable, the Court of Appeals found ERISA's generous provisions for access to the federal courts "persuasive evidence that Congress intended disputes under the statute to be resolved in a federal judicial forum." *Bird*, 871 F.2d at 297. *Rodriguez* arguably makes that evidence somewhat less persuasive, because the 1933 Act – which *Rodriguez* found arbitrable – contains similar provisions to preserve access to federal courts.[2] However, at least two other statutes with provisions for increased access to the federal courts, the Securities Exchange Act of 1934 and the antitrust laws,[3] had already been found arbitrable, so the impact of *Rodriguez* is only marginal. That decision does not disturb the Court of Appeals' assessment that "Federal court access for pension claimants and beneficiaries was explicitly included [by Congress] as a key ingredient of [ERISA.]" 371 F.2d at 297.

Turning to the second prong of the *McMahon* test, the overruling of *Wilko* does not alter the Court of Appeals' basic assessment that ERISA – when used to ensure fiduciary duties as opposed to enforcing the provisions of a specific plan – is a "remedial statute designed to 'curb . . . abuses of employee pension and welfare benefit plans by establishing minimum federal standards.' " 871 F.2d at 296-97 (relying on statutory language).

Rodriguez also does not alter the Court of Appeals' proper reliance on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)

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[2] *See* 15 U.S.C. § 77v(a) (1933 Act provisions) and 29 U.S.C. § 1132 (ERISA provisions).

[3] *See McMahon, supra,* and *Mitsubishi, supra*; *see generally* Shell, "ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an 'Adequate Substitute' for the Courts?" 68 Texas Law Review 509, 557 (1990) ("The special procedural protections ERISA provides claimants are not unique to the statute and do not answer the question of arbitrability . . . .").

and *McDonald v. City of West Branch*, 466 U.S. 284 (1984) for the proposition that "[w]hen enacting remedial legislation, Congress has limited or prohibited waiver of a judicial forum. Most often these injunctions occur in statutes designed to provide minimum substantive guarantees." *Id.* at 295. Finally, because *Rodriguez* does not alter the character of ERISA or the general rule that such federal minimum substantive guarantees are not suitable for arbitration, it does not alter the conclusion that ERISA claims for breach of fiduciary duty (as opposed to ERISA claims for benefits under the provisions of a particular plan) are not subject to compulsory arbitration.

CONCLUSION

Accordingly, this court finds that the ERISA claims are not subject to compulsory arbitration and the Motion for an Order Staying Proceedings Pending Arbitration is DENIED.

It is so ordered.

Dated at New Haven, Connecticut this 16th day of July, 1990.

/s/ José A. Cabranes

José A. Cabranes
United States District Judge

APPENDIX D

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of January one thousand nine hundred and ninety-one.

Present: HON. WILLIAM H. TIMBERS
HON. AMALYA L. KEARSE
HON. ROGER L. MINER

Circuit Judges,

FRANK L. BIRD, TRUSTEE OF FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, INDIVIDUALLY, AND JOAN SHEA,

Appellees,

-V- Docket No. 90-7688

SHEARSON LEHMAN/AMERICAN EXPRESS, INC., AND RAYMOND R. CLEMENTS,

Appellants.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the ORDER of said District Court be and it hereby is Reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

Elaine B. Goldsmith,
Clerk

/s/ Edward J. Guardaro

by: Edward J. Guardaro,
Deputy Clerk